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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965
No. 1399
or
OCTOBER TERM, 1966
No. 217

JOHNNIEMAE PATTERSON TIETZ, et al.,
Plaintiffs and Appellants,

vs.

MICHAEL J. MARIENTHAL, et al.,
Defendants and Appellees.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT.

PETITION FOR REHEARING

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In requesting rehearing of our appeal, denied on the ground of no federal jurisdiction involved, we fear that the Court's decision was due to the considerable involvement of argument in our Statement of Jurisdiction as well

as the repetition of appellees' Motion to Dismiss which insists that there is no federal question involved and that "the decision rests entirely on non-federal basis" and "is a question of state, not federal, concern."

Appellees' argument does not state the rule relating to the federal courts following the construction of a state court construction of a statute, nor the exception thereto, to which we call attention now by quoting authority, abundantly supported by decisions of this Court:

> "However, where a state statute is so construed as to render it open to the objection of repugnancy to the federal constitution, there is presented a federal question authorizing a review.'
>
> 36 CJS 737, #326, note 77, citing numerous cases;
>
> 25 CJ 944, #303, note 86
>
> "So, too, the federal court need not follow the state court decision on its own statutes, where following the state decision would conflict with the efficiency of some principle of the United States Constitution . . . or involve a violation of the Constitution of the United States."
>
> 36 CJS 401, #171, note 31, citing cases;
>
> 25 CJ #878, note 81.

The simple issue herein involved is whether the state statutes cited give absolute authority to the school principals on the assumption of the administrative discretion to commit any tort whatsoever, and is therefore unconstitutional.

In reply to appellees' Motion to Dismiss appellants filed a brief statement of authorities to the effect that discretion is not the mere will of the administrative officer but must be exercised in accordance with law. This question we think is adequately considered in Point I of appellants' Jurisdictional Statement, pages 8 to 15.

We think, maybe, this Court has overlooked the distinction between the principals' liability and that of the defendants School District and Board of Education which was recognized and stated by the state court on page A8 of Appendix of Jurisdictional Statement, to wit: "The governmental immunity of the public school agencies is governed by other principles of law." As follows in the opinion, it is clear that the court distinguished the case of those public school agencies and contended that the statutes relating to claim applied to the public school district and school board, and not to the principals. That is important because that leaves the question of immunity of liability of the principals to rest wholly and solely upon the question of the scope of discretion which was stated in our argument, page 8, quoting the court, which considered *that* the sole issue before it, in so far as the principals are concerned.

Making the distinction between the principals, on the one hand, and the school district and school board, on the other, makes clear that, while the claim statutes and the state court's decision thereon may be regarded as a state matter and not a federal question and therefore determinable by the state court's ruling, even though erroneous, it has no application to the principals whose discretionary authority is a matter which is not similarly determinable only by the decision by the state court but rests upon the civil rights, fundamental, personal civil rights, which are subject to the constitutional provisions and guaranty of due process of law and equal protection of the law.

Points II and IV of appellants' Jurisdictional Statement argue the liability of the school district and the board of education for the principals' tortious act.

By distinguishing appellants' Point I as to the principals, from appellants' other points of the Jurisdictional

Statement, we do not concede that the latter are state matters and not subject to the exception to the general rule of following state decisions and adopting their construction as to purely state jurisdictional matters. We still contend that the change in the claims statutes subsequent to the inception of the cause of action and also to the filing of the complaint, which revision of statutes wholly changed the nature and type of notice of claim, constitutes a denial of due process and of equal protection of the laws, as argued in our Jurisdictional Statement.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

This Petition for Rehearing is filed in good faith and not for the purpose of delay. It is restricted to the grounds specified.

.....
J. B. TIETZ

October 31, 1966

END